U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

Date: July 9, 1998

Case No. 97-**INA-0531**

In the Matter of:

THERESA VASQUES,
Employer,

on behalf of

MARIA A. LERIN,
Alien.

Appearance: N. A. Milner, Esq., of San Diego, California, for Employer and Alien

Before: Huddleston, Lawson and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of ma MARIA A. LERIN (Alien) by THERESA VASQUES (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at San Francisco, California, denied the application, the Employer appealed pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa, if the

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.[2]

STATEMENT OF THE CASE

On May 28, 1995, Employer applied by ETA form 750A for alien labor certification for the permanent full time employment of the Alien as a "Cook/Housekeeper with the following duties:

> Duties include: plan all meals according to the dietary needs and desires of the family; order/purchase all necessary foodstuffs and equipment for the planning and preparing of meals; prepare all meals including washing, peeling, and cooking by stove-top, microwave and convection oven, pressure-cooker, or barbeque; set the table and serve the meals; plan, order/purchase all suupplies and prepare meals for all special occassions, guests and parties, including appetizers, drinks and desserts; serve all food at parties and guest occassions; clear the table, wash the dishes and pans, and clean the kitchen following all meals; perform light sewing duties such as mending and replacing buttons; machine/ hand wash, press, and fold clothing and bed linens; spot clean soiled rugs and furniture, and perform any deep-cleaning necessary; sweep and mop kitchen, bathroom and hall floors; vacuum carpets and rugs; dust and polish furniture; disinfect all bathrooms and kitchen areas; clean and disinfect refrigerator.

AF 60. (Copied verbatim without correction or change to spelling or punctuation.)[3] By way of Other Special Requirements, the Employer specified the following:

> Knowledge of basic and special occassion/party food preparation according to recommended nutritional/dietary guidelines; knowledge of the use of household appliances: food blender, pressure cooker, microwave and conventional oven, gas and electric stove, food processor, barbecue grill, iron, washer and dryer, vacuum, deep-carpet cleaner.

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[2]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

[3] In the form ETA 750A the Employer said the Alien was to work a basic 40 hour week plus overtime of 2 - 4 hours. The hours were to be from 8:00 to 5:00 a.m.

AF 60.[4] (Copied verbatim without correction or change to spelling or punctuation.) The Employer required formal education was completion of nine years of grade school, and two years of experience in the Job Offered. This position was reclassified as Houseworker, General, under DOT Occupational Code No. 301.474-010. After it was advertised, four applicants were referred, but none was hired for the position for the reasons stated in the Employer's report. AF 72, 80-94, 96-102.

First Notice of Findings. On July 23, 1996, the Notice of Findings ("NOF") said that, subject to the Employer's rebuttal, the application would be denied on grounds that the hiring criteria were excessive in that the Employer required two years of experience in the position offered. This was found to be a restrictive requirement under 20 CFR § 656.21(b)(2)(i)(A), as it exceeded the level of preparation normally required for the successful performance of the job in the United States, and consequently would preclude the referral of otherwise qualified U. S. workers pursuant to 20 CFR §§ 656.3, 656.20(c)(8). Noting the reclassification of the position as a Houseworker General, based on the job duties Employer listed in Item 13 of Form ETA 750 A, the NOF said that the Specific Vocational Preparation ("SVP") for this position is thirty days to three months in the DOT, and not the two years the Employer required. The NOF then explained the Employer alternatively could (1) delete the restrictive requirement and retest the labor market; (2) justify the requirement on the basis of Employer's business necessity; or (3) demonstrate that the requirement is common to the occupation of Houseworker General. AF 56-57.

First Rebuttal. The Employer's rebuttal consisted of several pages of the file that the CO transmitted as AF 33-54. As no discussion summarized these documents, no inferences have been drawn and the evidence must speak for itself.

Second Notice of Findings. On July 23, 1996, a second NOF was issued in which the CO took note of Employer's position that she had followed the instructions and advice of the SESA in amending the original application for alien labor certification. After reconsidering the Employer's first rebuttal with the evidence of record, certification was again denied because the Employer fixed a hiring criterion of two years' experience in the position offered, which the CO found to be a restrictive requirement under 20 CFR § 656.21(b)(2)(i)(A). AF 29. This was based on the more fundamental finding that the correct classification of the duties Employer described in Item 13 of Form ETA 750 A was as a Houseworker General, and not as a Cook. The Second NOF again described the Employer's options in rebuttal, that it could delete the restrictive experience requirement and retest the labor market; prove that the two year experience requirement was a business necessity; or show that the requirement of two years' experience is common to the occupation of Houseworker General. AF 30-31.

Second Rebuttal. On August 30, 1996, the Employer filed a second rebuttal to address the issues noted in the Second NOF. AF 15-27. The rebuttal consisted of Employer's statement

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[4]The file also indicated as a further condition of employment that the Employer required the worker to live in and be available twenty-four hours a day. See the Employer's first rebuttal.AF 41-42.

plus the texts of the DOT job descriptions for a Cook (domestic ser.)[5] and a House Worker, General (domestic ser.)[6] and copies of other documents in the record. Employer argued that the CO erred in classifying this position as a House Worker, General, rather than as a Cook, Domestic. Rejecting the issue of the prevailing wage as a "red herring," Employer contended that her objective was to hire a cook, "who incidentally did some general housekeeping." While conceding that housekeeping was an element of the job offer, the Employer contended that this was "not the true focus of the position. On a daily basis, argued the Employer, the housekeeping would occupy less of the hourly schedule than would the cooking element of the position," citing her discussion of her need for a live in worker as evidence of the unending need for this worker to prepare food for meals and for virtually unending availability to prepare food for the entertainment of guests in the Employer's busy social schedule. AF 15-16.

The Employer declined to present factual evidence of her business necessity on grounds that, "It is not up to the CO to tell the employer his/her needs, based on the business necessity of the position. It is not up to the CO to tell the employer what his/her business necessity is." The Employer argued further that the CO had misapplied the DOT, which is "merely a guideline and should not be applied mechanically," ... "making it inflexible and unworkable with the needs of the employer." The Employer then conceded that the position entailed "a combination of duties that overlap into that of housekeeper," and argued that this alone was not sufficient to justify its reclassification as a housekeeper. By way of proving this point, the Employer compared the job elements of the DOT description of a House Worker, General, with a Domestic Cook, and she contended that the primary focus of the position that she described in Item 13 of Form ETA 750 A was in the cooking, rather than housekeeping. To further illustrate her point she observed that the U. S. workers whom she had rejected for the job all offered resumes that were directed toward the cooking element of this position, adding that an applicant who could only clean would clearly not have been qualified. In summary the Employer said, "It may or may not be

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[5] 305.281-010 **COOK, (domestic ser.)**Plans menus and cooks meals, in private home, according to recipes or tastes of employer: Peals, washes, trims, and prepares vegetables and meats for cooking. Cooks vegetables and bakes breads and pastries. Boils, broils, fries, and roasts meats. Plans menus and orders foodstuffs. Cleans kitchen and cooking utensils. May serve meals. May perform seasonal cooking duties, such as preserving and canning fruits and vegetables, and making jellies. May prepare fancy dishes and pastries. May prepare food for special diets. May work closely with persons performing household or nursing duties. May specialize in preparing and serving dinner for employed, retired or other persons and be designated Family-Dinner Service Specialist(domestic ser.).

[6]301.474-010 **HOUSE WORKER, GENERAL (domestic ser.) alternate titles: housekeeper, home** Performs any combination of following duties to maintain private home clean and orderly, to cook and serve meals, and to render personal services to family members: Plans meals and purchases foodstuffs and household supplies. Prepares and cooks vegetables, meats and other foods according to employer's instructions or following own methods. Serves meals and refreshments. Washes dishes and cleans silverware. Oversees activities of children, assisting them in dressing and bathing. Cleans furnishings, floors, and windows, using vacuum cleaner, mops, broom, cloths, and cleaning solutions. Changes linens and makes beds. Washes linens and other garments by hand or machine, and mends and irons clothing, linens, and other household articles, using hand iron or electric ironer. Answers telephone and doorbell. Feeds pets. GOE: 05.12.18 STRENGTH: M GED: R3 M2 L2 SVP: 3 DLU: 86 305.281-010

justified by the other regulations, as the CO may see fit, but the business necessity element is clearly within the purview of the employer, not the government." AF 18.

The Employer further argued that the CO did not have the authority to determine the proper job classification and "to force an otherwise inconsistent job title on the employer." "The CO," she contended, "has not provided on single form of evidence as to why this job must be classified as that of a housekeeper and not that of a cook," arguing that no regulation gave the CO the authority to exercise that discretion. The Employer put forward as proof of her business necessity (1) a job description that emphasized the cook element of the position she offered, (2) her willingness to amend the wage offer to the level of the prevailing wage, and (3) her good faith recruiting campaign within the regulations. AF 19. The Employer then cosigned the rebuttal argument with her attorney.

Final Determination. In the Final Determination issued October 30, 1996, the CO summarized all of the NOF discussions and explained the reasons certification was denied, based on 20 CFR §§ 656.21(b)(2)(i)(A), 656.21(e), and 656.40(a)(2)(i). The CO found (1) that the Employer had failed to offer the prevailing wage for the position of House Worker, General, and (2) that the Employer failed to offer the position of House Worker, General, without the unduly restrictive requirement of excessive experience of two years in the Job Offered.[7]

The CO said Employer failed to rebut the finding that the experience requirement of two years was excessive and unduly restrictive, observing that inclusion of the live-in requirement was not persuasive proof of the nature and content of the job offered, and that the Employer had been offered the opportunity to amend the wage level to meet the job classification in both the first and second NOF. After quoting Employer's job description and Other Special Requirements, the CO said Items 13 and 15 of Employer's Form ETA 750 A had commingled cooking duties with general housekeeping duties, and quoted the DOT occupational descriptions of both titles to illustrate this finding. The CO then examined both DOT job descriptions together with the Employer's application for alien labor certification and concluded that the job offer more closely resembled the occupational description of House Worker, General, and that the Employer had failed to rebut the NOF and supplemental and amended NOF findings regarding the proper classification of the position offered and her requirement of two years' experience as a hiring criterion for that job.[8] AF 13-14.

Appeal. The Employer appealed on November 30, 1996, and attached an appellate brief that repeated the arguments she made in both rebuttals. AF 01-10.

Discussion

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[7] The CO further found that the Employer was duly offered the opportunity to amend the wage offer in the NOF and in the supplemental and amended NOF.

[8] The CO also found that the Employer declined to amend her wage offer.

The issue is whether the CO correctly found the Employer's description of the position offered to require a combination of duties that was unduly restrictive under the Act and regulations. It is well established that, if an employer's job description lists duties which do not appear in any single DOT job description, it may be found that the position offered for certification requires a combination of duties. **H. Stern Jewelers, Inc.**, 88 INA 421(May 23, 1990). As 20 CFR § 656.21(b)(2)(ii) presumes that a combination of duties is an unduly restrictive requirement, the employer bears the burden of establishing that such a combination is customarily required for the occupation described. If the Employer does not offer to prove that the designated combination of duties is customary, the employer must establish its business necessity. If the employer fails to prove the business necessity of the combination of duties, the CO's denial of labor certification will be affirmed. **H Stern**, *supra*.

To prove the business necessity of a combination of duties, the employer must show that it is necessary to have one worker perform the combined duties in the context of the employer's business. This proof includes showing that the employment of two workers is impractical in that such reasonable alternatives as the use of part-time workers are infeasible. Simply asserting the convenience or practicality of splitting the job duties is not sufficient to demonstrate the business necessity of the combination of duties, however. **Robert L. Lippert Theaters**, 88 INA 433 (May 30, 1990)(*en banc*).

The Employer's rebuttal and brief clearly indicated that it was aware of the criteria to follow in proving the business necessity of its combination of duties under **Information Industries, Inc.**, 88 INA 082(Jan. 13, 1988)(*en banc*). Under 20 CFR § 656.21(b)(2),

> The employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements: (i) The job opportunity's requirements, unless adequately documented as arising from business necessity: (A) Shall be those normally required for the job in the United States; (B) Shall be those defined for the job in the *Dictionary of Occupational Titles (D.O.T.)* including those for subclasses of jobs... .

The Employer was entitled to prove that she could not afford to hire two workers for the combined duties it set out in the job description. **Wang Westland Industrial Corp.**, 88 INA 027 (Mar. 3, 1989)(*en banc*). For example, the employer could have established the infeasibility of such reasonable alternatives as part time workers, new equipment, or business reorganization to accomplish the combined duties. **Robert L. Lippert Theatres**, 88 INA 433 (May 30, 1990)(*en banc*); **Gencorp**, 87 INA 659 (Jan. 13, 1988)(*en banc*).

As the Employer vigorously argued that the CO failed to carry the burden of proof as to the pivotal issue, it is appropriate to observe that labor certification is a privilege that the Act expressly confers by giving favored treatment to a limited class of alien workers, whose skills Congress seeks to bring to the U. S. labor market in order to satisfy a perceived need for their services. 20 CFR §§ 656.1(a)(1) and (2), 656.3 ("Labor certification"). The scope and nature of the grant of this statutory privilege is indicated in 20 CFR § 656.2(b), which quoted and relied

on § 291 of the Act (8 U.S.C. § 1361) to implement the burden of proof that Congress placed on certification applicants, such as this Employer:

> "Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act... ."[9]

Because the Employer has applied for an exception to the Act's broad limits on immigration into the United States, the Panel will apply the Act and regulations to the Alien's entitlement to labor certification under the well-established principle that statutes granting exemptions from their general operation must be strictly construed, and that any doubt must be resolved against the party invoking such an exemption from a statute's general operation. See 73 Am Jur2d § 313, p. 464, citing **United States v. Allen**, 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896). It follows that in pursuing alien labor certification, the applicable law required that the Employer and not the CO must carry the burden of proof as to all of the issues arising under this application for relief pursuant to the Act and regulations.

The evidence of record supported the CO's finding that the job offered in Employer's application incorporated a combination of duties that exceeded those described in the DOT for a Cook, Domestic. In offering permanent, full time employment to which U. S. workers could be referred, Employer was required to show that it was customary and normal to hire a Cook, Domestic, as described in the DOT to perform the combination of duties described in its application, or that the combination of duties that it described either was customary and normal for a Cook, Domestic or was a business necessity. The Employer, however, declined to offer any evidence of business necessity other than her position description, her contention that she had emphasized the duties of a Cook rather than the duties of the House Worker, her her representation that she would pay the prevailing wage, and the fact that she had engaged in the recruiting activity required by the Act and regulations. As Employer twice conceded that the position was a combination of the duties of a Cook and a House Worker, the only evidence relevant to this application was proof that the combination of duties described was customary and normal for either occupation or that the combination of duties was a business necessity. The Employer declined to eliminate the admitted "overlap" of duties, however, or to show her combination of duties to be customary and normal for either of these occupations or to prove that the combination of duties she proposed was a business necessity.

The evidence of record supported CO's finding that the Employer failed to sustain her burden of proof that the proposed combination of the duties of a Cook, Domestic, with the duties

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[9]The legislative history of the 1965 amendments to the Immigration and Nationality Act establishes that Congress intended that the burden of proof in an application for labor certification is on the employer who seeks an alien's entry for permanent employment. See S. Rep. No. 748, 89th Cong., 1st Sess., reprinted in 1965 U.S.D. Code Cong. & Ad. News 3333-3334.

of a House Worker, General, was customary and normal for these two occupations or that it was justified by business necessity, as the record does not contain persuasive evidence that all of the duties specified in Item 13 of Form ETA 750A were required to perform the work of either a Cook or a House Worker. Although the Employer ostensibly complied with the directions to file evidence supporting her position on the issues the NOF raised in this case, the facts were not proven by the Employer's vague assertions in which she limited herself to general statements that appeared unconnected with the tangible data. Because the Employer's rebuttal consisted of nothing more than her own unsupported assertions, the Panel observes that Employer's evidence of the appropriateness of a job requirement is insufficient to prove either that the combination of duties was customary and normal for either occupation or the business necessity of that combination of duties in a single position in her household. **Watkins-Johnson Company,** 93 INA 544 (April 10, 1993).

The two NOF's provided sufficient notice of the reasons for the denial of certification, and told the Employer how to cure the defects found in the application. Employer offered to rebut the CO's findings by narrative statements that were not supported by the documentation specified in the NOF as to the restrictive requirements.[10] In spite of detailed directions in the NOFs, Employer's rebuttal neither submitted the documentary proof required nor amended or reduced to the normal qualifications level the job requirements for this position that the CO identified as unlawfully restrictive under the Act and regulations. On review the Panel has found that the evidence supported the CO's finding that the position offered in Employer's application incorporated a combination of duties that exceeded those described in the DOT for either occupation, regardless of whether or not the job was reclassified under the DOT and the regulations cited and quoted above. Accordingly, the following order will enter.

[10] Noting counsel's argument in both rebuttal filings and the Appellate Brief, the Panel observes that this Board has in the past held *en banc* that a factual theory presented by counsel in a brief cannot serve as evidence of material facts. **Yaron Development Co., Inc.**, 89 INA 178 (Apr. 19, 1991)(*en banc*). To the same effect see also **Mr. and Mrs. Elias Ruiz**, 90 INA 425(Dec. 9, 1991); **D & J Finishing Co., Inc.**, 90 INA 446 (Nov. 4, 1991); **Personnel Services, Inc.**, 90 INA 043 (Dec. 12, 1990); **DeSoto, Inc.**, 89 INA 165 (Jun. 8, 1990); **Dr Sayedur Rahman**, 88 INA 112 (Mar. 20, 1990).

ORDER

The Certifying Officer's decision denying certification under the Act and regulations is hereby Affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.